

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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DAVID BURNS,

Case No. 3:22-cv-00021-MMD-CLB

Petitioner,

ORDER

v.

WARDEN RUSSELL, *et al.*,

Respondents.

Following upon the filing of notices of appearance (ECF Nos. 12, 13) by the Federal Public Defender ("FPD") and a motion for leave to proceed in forma pauperis (ECF No. 10) by Petitioner, the Court will grant Petitioner's motion for leave to proceed in forma pauperis and appoint FPD counsel.

It is therefore ordered that the motion for leave to proceed in forma pauperis (ECF No. 10) is granted.

It is further ordered that the Federal Public Defender, through Ron Sung, Esq. and Jonathan M. Kirshbaum, Esq., is appointed as counsel for petitioner pursuant to 18 U.S.C. § 3006A(a)(2)(B). Counsel will represent Petitioner in all federal proceedings related to this matter, including any appeals or certiorari proceedings, unless allowed to withdraw.

It is further ordered that Petitioner has until up to and including ninety days from entry of this order within which to file an amended petition and/or seek other appropriate relief. Neither the foregoing deadline nor any extension thereof signifies or will signify any implied finding as to the expiration of the federal limitation period and/or of a basis for tolling during the time period established. Petitioner remains responsible for calculating the running of the federal limitation period and timely asserting claims, without regard to any deadlines established or extensions granted herein. That is, by setting a deadline to

1 amend the petition and/or by granting any extension thereof, the Court makes no finding
2 or representation that the petition, any amendments thereto, and/or any claims contained
3 therein are not subject to dismissal as untimely. See *Sossa v. Diaz*, 729 F.3d 1225, 1235
4 (9th Cir. 2013).

5 It is further ordered that Respondents must file a response to the amended petition,
6 including potentially by motion to dismiss, within 60 days of service of an amended petition
7 and that Petitioner may file a reply thereto within 30 days of service of the answer. The
8 response and reply time to any motion filed by either party, including a motion filed in lieu
9 of a pleading, will be governed instead by Local Rule LR 7-2(b).

10 It is further ordered that any procedural defenses raised by Respondents to the
11 counseled amended petition must be raised together in a single consolidated motion to
12 dismiss. In other words, the Court does not wish to address any procedural defenses
13 raised herein either in seriatum fashion—in multiple successive motions to dismiss or
14 embedded in the answer. Procedural defenses omitted from such motion to dismiss will
15 be subject to potential waiver. Respondents may not file a response in this case that
16 consolidates their procedural defenses, if any, with their response on the merits, except
17 pursuant to 28 U.S.C. § 2254(b)(2) as to any unexhausted claims clearly lacking merit. If
18 Respondents do seek dismissal of unexhausted claims under § 2254(b)(2): (a) they must
19 do so within the single motion to dismiss not in the answer; and (b) they must specifically
20 direct their argument to the standard for dismissal under § 2254(b)(2) set forth in *Cassett*
21 *v. Stewart*, 406 F.3d 614, 623-24 (9th Cir. 2005). In short, no procedural defenses,
22 including exhaustion, must be included with the merits in an answer. All procedural
23 defenses, including exhaustion, instead must be raised by motion to dismiss.

24 It is further ordered that, in any answer filed on the merits, Respondents must
25 specifically cite to and address the applicable state court written decision and state court
26 record materials, if any, regarding each claim within the response as to that claim.

27 It is further ordered that any state court record and related exhibits filed herein by
28 either Petitioner or Respondents must be filed with a separate index of exhibits identifying

1 the exhibits by number. The CM/ECF attachments that are filed further must be identified
2 by the number or numbers of the exhibits in the attachment. If the exhibits filed will span
3 more than one ECF Number in the record, the first document under each successive ECF
4 Number must be either another copy of the index, a volume cover page, or some other
5 document serving as a filler, so that each exhibit under the ECF Number thereafter will
6 be listed under an attachment number (i.e., Attachment 1, 2, etc.).

7 It is further ordered that the hard copy of any exhibits filed by either counsel must
8 be delivered—for this case—to the Reno Clerk's Office. Courtesy copies of exhibits need
9 not be provided.

10 DATED THIS 11th Day of May 2022.

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14 MIRANDA M. DU
CHIEF UNITED STATES DISTRICT JUDGE